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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 292

WILLIAM MURRAY ESTEP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 281–289) and dissenting (R. 289–306) opinions of the Circuit Court of Appeals are reported at 150 F. 2d 768.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 6, 1945 (R. 307). The petition for a writ of certiorari was filed on August 3, 1945, and was granted on October 8, 1945 (R. 309). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

In a criminal prosecution under the Selective Training and Service Act of 1940 for having failed to submit to induction, was petitioner entitled collaterally to challenge the validity of the induction order on the grounds that on the evidence before the appeal board he had been improperly denied exemption from service under the Act as a minister of religion and that there were administrative irregularities in the consideration of his case?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, and of the Selective Service Regulations, are set forth in Appendix A and Appendix B, respectively, of the brief for the United States in *Smith* v. *United States,* No. 66, this Term, pp. 57–60, 61–91.[1]

STATEMENT

On December 8, 1944, petitioner was convicted (R. 155–156) in the United States District Court for the Western District of Pennsylvania for

[1] We have separately set forth in Appendix A, *infra*, pp. 30–40, those Selective Service Regulations which are material to the consideration of asserted irregularities in the consideration of petitioner's case by the local board and the appeal board.

having knowingly refused to submit to induction into the United States Navy as was required of him by the order of his local board, in violation of Section 11 of the Selective Training and Service Act of 1940, as amended;[2] he was sentenced to imprisonment for a term of five years (R. 160). His appeal to the Circuit Court of Appeals for the Third Circuit was first argued before a court of three judges and subsequently, at the instance of the court, was reargued before the court sitting *en banc* (R. 279–280). On the appeal, the judgment of the district court was affirmed by the vote of four judges, with two judges dissenting (R. 281–306, 307).

The opinion of the court held that petitioner was required to complete the Selective Service procedure before he could challenge the action of the Selective Service System in the courts by resorting to habeas corpus, and that the procedure was not completed until the induction order was complied with by submitting to induction (R. 281–289). The dissenting judges were, *inter alia*, of the view that the Selective Service procedure had come to an end when petitioner's acceptability to the armed forces was ascertained; that he was therefore entitled to attack the induction order in defense of the prosecution in his criminal trial;

[2] Pursuant to stipulation of the parties (R. 154–155) that since a unanimous verdict was unobtainable, the case should be decidetl by a majority verdict of the jury, the court accepted the vote of eleven of the jurors as the verdict (R. 155–156).

and that if petitioner had submitted to induction, he would have voluntarily placed himself under military jurisdiction and habeas corpus would not have been available to test the legality of the administrative action (R. 289–306).

The failure to submit to induction.—The facts adduced at the trial relating to the failure to submit to induction are undisputed. On September 1, 1944, after petitioner had been finally classified I–A by his board of appeal, the local board sent him an order to report for induction (Gov. Ex. 2, R. 165–166), notifying him that he had been selected for military service and directing him to report for induction on September 11, 1944 (R. 8). On that date petitioner reported to the local board and he was furnished transportation to the induction station (R. 8). Petitioner testified that he went through the process at the induction station by which his acceptability to the armed forces was determined (R. 104–105; see also R. 31, 35–36), but that when he was given a choice as to which branch of the Navy he desired to enter, "I told the officer in charge there that I had no choice * * * that I was an ordained minister of the gospel * * *" (R. 105–106). Petitioner presented to one of the officers a letter (R. 38–39) explaining his position, but the officer returned it and directed petitioner to return to the induction station on the following day (R. 106).

Petitioner reported back the next day and he was given various papers to fill out preparatory

to his induction into the Navy. When he reached one which contained an oath that he agreed to support the United States Government in time of war and that he would submit to the command of the President, as commander in chief, he declined to sign it. He explained to an officer at the induction station that, "I was an ordained minister of the gospel and that my occupation was that of preaching the gospel of the kingdom, and that I was merely complying with the Selective Service regulations by appearing there that morning and filling out the various forms and going through the various forms of procedure of induction." (R. 107.) At this point in the procedure, petitioner explained to another officer his reason for refusing to sign the oath and he gave him the letter (*supra,* p. 4) explaining his position.

The letter (R. 38–39) was addressed "To Officer in Charge, Induction Station" and recited that, "I am reporting to this induction center because I am required by law and by the decision of the Supreme Court so to report"; that he was a minister and would obey all laws which did not require him to give up the ministry; that he was entitled to exemption from service and he therefore could not be required to submit to induction; and that "Since the Supreme Court has said that the military authorities cannot forcibly induct me, I ask the Commanding Officer to release me after I have complied with all the orders of the induction station up to submission to actual in-

duction in order that I might make my defense in Federal Court." Petitioner was taken to the Commanding Officer of the induction station, where he explained again that he reported to the induction station to "exhaust my administrative remedies" (R. 110). The commanding officer read to petitioner the appropriate regulations relating to the induction ceremony and then directed petitioner to submit to induction by stepping forward (the method of induction at that time; see R. 290) when his name was called. He called petitioner's name and petitioner replied, "I refuse to take the step forward, because I refuse to be inducted into the Navy" (R. 34, 110). Petitioner was then notified that he was free to leave the induction station (R. 32–38, 107–113).[3] When petitioner was subsequently questioned by an agent of the Federal Bureau of Investigation he told the agent that by his course of conduct he had placed himself in a position to have a good defense when his case came to trial (R. 40–41).

The selective service classification.—Petitioner sought in defense of the indictment (R. 1) to show that as a Jehovah's Witness he was a minister of religion and that because the classifying agencies acted arbitrarily and capriciously, and because of claimed irregularities in the treatment of the case by the local board, he had been im-

[3] On cross-examination petitioner testified that the commanding officer had been "very polite" and had been "a gentleman all the way through" (R. 112).

properly denied exemption from service under the Act. To this end, he offered his entire selective service file in evidence, as well as independent testimony calculated to show that he was a minister of religion. The trial court was of the view that the induction order was not open to collateral attack in the criminal trial (see, *e. g.*, R. 18–19) and, accordingly, it rejected the independent testimony as to petitioner's ministerial status (R. 66–74) and excluded those documents in the selective service file which related solely to the question of petitioner's ministerial status (see R. 45–50). The court instructed the jury that "we must accept [the selective service classification] as a proper classification; and the only issue we have to determine in this case is whether or not this defendant complied with the law by submitting to induction or not" (R. 147). The evidence adduced at the trial bearing on the action of the Selective Service System may be summarized as follows:[4]

[4] The trial court received in evidence every document in petitioner's selective service file, except Defendant's Exhibits A (R. 167–189), C (R. 192), D (R. 193), F (R. 200–211), J (R. 218) and N (R. 224) which were offered by petitioner and excluded on objection by the Government that they had no evidential value (see R. 45–52). Dissenting Judge Biggs, who alone discussed the contents of the selective service file in detail (R. 289–290), did not, for purposes of the appeal, distinguish between those documents which were received in evidence and those which were offered but rejected. We shall proceed on the same basis in detailing the sequence of events in the classification proceedings.

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Petitioner registered with Local Board No. 4, Washington County, Pennsylvania, on June 30, 1942 (R. 6). On August 22, 1942 (R. 6) he filed the selective service questionnaire (Gov. Ex. 1, R. 161–165) in which he stated that he was twenty years old; that he had a high school education; that his present occupation was that of a minister and that he had one year's experience in the work; that for a time in 1941 he worked as a mason's laborer; that he had been a minister of Jehovah's Witnesses since March 1936, and that he had been ordained on October 1, 1942;[5] that he was conscientiously opposed to war in any form;[6] and that in his opinion he should be classified in IV–D, the classification given ministers of religion. He attached to the questionnaire a statement (R. 214–215) explaining his status in the Jehovah's Witnesses sect, and at the same time he filed an occupational questionnaire (Def. Ex. B, R. 190–

[5] Petitioner advised the local board at a later time that he was ordained on October 1, 1941, and that the 1942 date in the questionnaire was a mistake (see R. 201).

[6] Petitioner notified the local board, however, that he asserted a claim to conscientious objection only in support of his claim for classification as a minister of religion and that he did not desire classification as a conscientious objector (see R. 200; Def. Ex. I, R. 217). In the conscientious objector form which he submitted (Def. Ex. E, R. 196) petitioner stated that "I believe in the use of force in defense of my life and property and in defense of my family and fellow Christians * * *."

191) in which he also claimed to be a minister of religion.[1]

On October 3, 1942, petitioner was classified I–A (available for military service) by his local board. On October 10, petitioner wrote the board a letter (Def. Ex. D, R. 193–194) requesting that he be given a hearing and enclosing a copy of a certificate that he was associated with the Watchtower Bible and Tract Society (Def. Ex. C, R. 192–193) and another issue of "Consolation" containing an article "Jehovah's Witnesses—Ordained Ministers" (R. 98). On October 21, petitioner was given a hearing before the local board and a transcript was taken of his interrogation at that time (Def. Ex. F, R. 200–211). Petitioner stated at the hearing, *inter alia*, that although he claimed to have been ordained as a minister on October 1, 1941, his name was not included in the list of ministers furnished the Selective Service System by the Watchtower Bible and Tract Society until after October 1, 1942 (R. 201); that he received his ordination "by performing the work of Heavenly faith" (R. 209); that he never preached sermons or acted as chairman of the local meetings of Jehovah's Witnesses, even when the regular chairman was absent (R. 206); that his work con-

[1] The questionnaire apparently was also accompanied by a copy of "Consolation," a magazine published by the Watchtower Bible and Tract Society, which contained material calculated to show that Jehovah's Witnesses are ministers of religion.

sisted of going from house to house and preaching to the people by "taking a phonograph [record of a lecture by Judge Rutherford] which we carry and play it in front of their door" (R. 203);* that he devoted two hours on Saturdays to distributing literature (R. 204); that ministers in the Jehovah's Witnesses sect received no fees or money, and that he was dependent upon his father for support (R. 203–204); that he worked as a mason's laborer with the Carnegie-Illinois Steel Corporation until October 1, 1941, and at that

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* A portion of the inquiry concerning petitioner's activities was as follows (R. 202):

Mr. Davidson:

Q. What would be your daily activities in your work?

A. Well, as I stated, our work is to preach the God's Kingdom from house to house.

Mr. Reese:

Q. Take last week and give us the itinerary. What did you do last week?

A. I don't recall exactly.

Q. Give us the high points of the activities?

A. I just don't recall what I did do last week.

Q. Do you recall what you did on Monday and Tuesday of last week?

A. No, I don't recall.

Q. On the 14th can you recall what you did?

A. Not especially.

Q. On the 15th, 16th, and 17th can you give us an outline of your itinerary?

A. Starting on Monday, week before last, I was active in this work especially Monday, Tuesday, and Wednesday. I can't state exactly whether it was last week or the week before. My brother and I were active in the rural section of Washington [county].

time he decided to devote his full time to the ministry (R. 211). After petitioner had outlined his claim to ministerial classification and his activities at the hearing he was asked by a member of the board whether there was anything else he wished to state to the board before he left and he replied, "No" (R. 210–211).

On the day following his appearance before the local board petitioner was advised that "this board after carefully considering your case have refused you a change of classification as a minister" (Def. Ex. G, R. 212). On October 27, 1942, petitioner filed a notice of appeal and in the notice he designated what he believed to be pertinent information in his file in support of his claim (Def. Ex. H, R. 213; R. 99).

In November 1942, petitioner offered to the local board's clerk, for transmission to the appeal board (R. 100), his affidavit and the affidavits of three other Jehovah's Witnesses in support of his ministerial claim (R. 175–181).* He testified that, "I was told that it was impossible to file these affidavits, as my case had then gone up before the Appeal Board" (R. 100; see also R. 16). At this stage of the proceedings, the exact

*Petitioner is mistaken in his statement (Br. 21) that he filed the affidavits in question at the same time that he took the appeal. In the trial court, although his counsel suggested that the affidavits were filed in October 1942, petitioner testified that the affidavits were offered to the local board in the "first part of November" (R. 100).

time not being fixed, petitioner's selective service file was misplaced (R. 14) and nothing further occurred in connection with his classification until February 1944 (R. 100–101), when the local board sent petitioner a form for conscientious objectors, which petitioner returned unanswered, stating, *inter alia*, that "I do not wish to add anything further to my file at this time as the information it now contains fully explains my position as a minister * * *" (Def. Ex. I, R. 217).[10]

In April 1944, petitioner was ordered by the local board to report for a preinduction physical examination (Def. Ex. K, R. 220) as a preliminary step to consideration of his case by the appeal board (Reg. 627.14, *infra*, pp. 39–40). He reported and was found physically fit for service in the Navy[11] (Def. Ex. L, R. 221). Thereafter, petitioner examined his selective service file and learned that his case had not yet been considered by his board of appeal (R. 101–102). Accord-

[10] Petitioner had filed such a form in 1942 shortly after he registered (Def. Ex. E, R. 194–199). The reason for requesting him to file a new questionnaire in 1944 does not appear from the record or the selective service file.

[11] At the time of *Falbo* v. *United States*, 320 U. S. 549, the selective service process included a preliminary examination by a doctor attached to the local board, but it did not include a preinduction examination at the induction station. The selective service procedure was changed in January 1944, to provide for a preinduction physical examination at the induction station, as well as a final one when the registrant reports for induction. See *Billings* v. *Truesdell*, 321 U. S. 542, 554–555.

ing to petitioner, part of the file was missing (but see *infra,* pp. 19–20), and on May 23, 1944, he undertook to supply the local board with copies of the allegedly missing documentary evidence, together with additional evidence in support of his claim to classification as a minister of religion, including his statement and the three affidavits which he had been unable to file in November 1942, after he had been classified by the local board (see *supra,* p. 11) (R. 102–103; Def. Ex. A, R. 167–189). The proffered evidence was accompanied by a letter to the local board, dated May 23, 1944, requesting the local board to reconsider petitioner's classification and to classify him in IV–D, and it further requested that, if the local board refused to classify him as a minister, the letter be treated as an appeal to the board of appeal (R. 167–168). The local board apparently did not entertain the application to reopen the classification. The chief clerk of the local board, testifying as a witness for petitioner, testified that this material was received but was not placed in the file as part of the evidence for consideration by the board of appeal (R. 42).

On July 28, 1944, the file was forwarded to the appeal board and on August 2, 1944, the appeal board by a vote of 4 to 0 classified petitioner I–A (Def. Ex. M, R. 222; Def. Ex. O, R. 226). Upon being notified of his classification, petitioner requested the State and National Directors of

Selective Service to review his case (Def. Ex. Q, R. 229–231). On September 4, 1944, petitioner was advised by the State Director that "Your case was carefully reviewed at this Headquarters after the board of appeal rendered its decision, and it was then determined that no action on our part would be justified. We have carefully considered your letter of August 31, 1944 (R. 229–230), and still do not deem any action on our part justified in your case" (Def. Ex. R, R. 233). The order to report for induction (*supra*, p. 4) was issued at this stage of the proceedings.

SUMMARY OF ARGUMENT

As in *Smith* v. *United States*, No. 66, with which this case has been consolidated for argument, it is the Government's position, in reliance upon the considerations advanced in *Falbo* v. *United States*, 320 U. S. 549, that petitioner was not entitled to defy his induction order for the purpose of challenging its validity in a criminal prosecution under the Act. The induction order is one of those instances in the law in which the citizen must obey the order before resorting to the courts to contest its validity. Petitioner's argument that this case differs from the *Falbo* case because he had reached the point in the selective service procedure where his acceptability to the Navy had been finally ascertained, while the petitioner in the *Falbo* case withdrew from the process at

an earlier point, may be conceded. But the distinction, we submit, does not demand the application of a different rule here. In both cases the selective service procedure was disrupted before the defendant had fully complied with the induction order of his local board. Remission of a registrant to his remedy by way of habeas corpus after induction insures to him his day in court without litigiously interrupting the mobilization program and preserves his services for the armed forces in the event that he is mistaken in his contention that the induction order is invalid.

In the Argument (*infra*, pp. 19–29), we demonstrate that petitioner's contention that he was denied procedural due process is unfounded. In any event, this contention does not in principle distinguish this case from the *Smith* and *Falbo* cases. Petitioner's contention is that the appeal board failed to consider material evidence which he submitted and that it considered other incompetent evidence. In substance, this is no different from the contention in the *Falbo* and *Smith* cases that, because of an antipathy to the Jehovah's Witnesses sect, the classifying board disregarded the evidence before it and acted in an arbitrary and capricious manner. In either event, if the defense is available and is sustained, the classification must be set aside and conversely if the defense is not open in the *Falbo* and *Smith* cases, there is no room for its assertion in this case.

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ARGUMENT

HAVING REFUSED TO SUBMIT TO INDUCTION, PETITIONER WAS NOT ENTITLED TO CHALLENGE THE PROPRIETY OF HIS SELECTIVE SERVICE CLASSIFICATION IN HIS CRIMINAL TRIAL. HABEAS CORPUS AFTER INDUCTION IS THE EXCLUSIVE REMEDY TO TEST THE CONSTITUTIONALITY OF THE INDUCTION ORDER

A. THE AVAILABILITY OF THE DEFENSE IN THE CRIMINAL TRIAL

The fundamental question presented is whether a selective service registrant who, with a view to testing the legality of his selective service classification, intentionally violates his induction order by refusing to submit to induction, may collaterally attack the induction order as a defense in his criminal trial for having failed to perform a duty under the Act. In the courts below petitioner urged that the doctrine of *Falbo* v. *United States*, 320 U. S. 549, is not applicable where, as here, the defendant reports to the induction station but refuses to submit to induction. Both courts, however, agreed with the view advanced by the Government in reliance on the considerations set forth in the *Falbo* decision that where the induction order is valid on its face, the registrant is obliged to obey it. Under that view, when the registrant has taken the last step required of him by the induction order and has submitted to induction, he becomes subject to military jurisdiction and is free to test the validity of the induction order by resorting to habeas corpus. Since this, we think, is what Congress intended and what the *Falbo* decision recognized, we reassert the same

view in this Court. The arguments in support of our position are stated, *in extenso*, in the brief for the United States in *Smith* v. *United States*, No. 66, with which this case has been consolidated for argument. The Court is respectfully referred to that brief, pp. 31–56.[12]

We are mindful of petitioner's argument (Br. 194–202), that this case differs from the *Falbo* and *Smith* cases, *inter alia*, in that, in addition to claiming that he was arbitrarily classified, petitioner urges also that he was denied procedural due process. We shall demonstrate that petitioner was not denied procedural due process (*infra*, pp. 19–29), but assuming, *arguendo*, that the contrary is true, we think that the distinction which he urges does not aid him. Cf. *Yakus* v. *United States*, 321 U. S. 414, 446–447.

In the *Falbo* case it was urged that the classification was invalid because it was without evidentiary support and because the local board was prejudiced against Jehovah's Witnesses and failed to admit certain evidence which Falbo offered. (See 320 U. S. 551, 555, 556, 557.) As we interpret the petitioner's position in the *Smith* case, he too urges that he was denied classification as a minister of religion because the local board was prejudiced against Jehovah's Witnesses. In both cases the substance of the complaint was that the

[12] See generally, Elliff, *Jehovah's Witnesses and the Selective Service Act*, 31 Va. L. Rev. 811.

classifying agency did not act on the basis of the evidence before it. We think that petitioner's claim is, in substance, no more than this. As we understand his position, he predicates his claim that he was denied procedural due process principally on the proposition that his letter of May 23, 1944, together with the accompanying affidavits, should have been submitted by the local board to the appeal board for its consideration in passing on petitioner's appeal and that the local board departed from the Selective Service Regulations when it submitted to the appeal board a letter giving the local board's reasons for classifying petitioner I–A. In other words, petitioner is urging that the appeal board did not have an opportunity to consider evidence which it should have considered and that it had before it a letter which it should not have considered. We think that this asserted defect is of the same character as the claims in the *Falbo* and *Smith* cases; that there is no substantial difference between a claim that because of prejudice or for any other reason the classifying board totally disregarded the evidence before it and a claim, such as is advanced in this case, that (1) the classifying board disregarded the evidence and (2) that it acted without having before it pertinent evidence in the case. In either instance, if the defense is available and is sustained, the classification must be set aside. And conversely, if the defense is not open in the *Falbo* and *Smith* cases, there is no room for its assertion in this case.

B. THE ASSERTED DENIAL OF PROCEDURAL DUE PROCESS

As we have stated, petitioner maintains in this Court, as he did in the courts below, that he was denied procedural due process by the Selective Service System. While we believe that the claim is immaterial to the disposition of this case, the charges are of such a serious character that we are not disposed to let them pass without controverting them. Our examination of the selective service cover sheet in this case (see R. 42; Gov. Exs. 1 and 2 and Def. Exs. B–S and U–W, R. 161–166, 190–238, 240–243) convinces us that while certain administrative irregularities, such as the loss of the file, exist in the case, none prejudiced petitioner and none is of due process stature. In the discussion which follows we shall deal with each such claim which petitioner advanced in the administrative and judicial proceedings.

1. *The allegedly missing evidence.*—In his letter of May 23, 1944, to the local board, petitioner stated (R. 167):

> I went over my Selective Service file yesterday and found that certain statements which had been attached to my questionnaire; ministerial certificate from the Watchtower Bible & Tract Society dated December 24, 1941; copy of "Consolation" magazine No. 569 (containing an article setting forth the opinion of National Headquarters of Selective Service concerning Jehovah's witnesses as ordained ministers);

> letters of October 10 and October 27, 1942 to Local Board No. 4; and copy of letter from Local Board No. 4 dated October 22, 1942, are all missing from my file. I have prepared copies of these letters and statements and attach them hereto.

Our examination of the selective service cover sheet reveals that each of the allegedly missing documents is contained in the cover sheet and the local board's clerk testified at the trial that no papers were lost from the file (R. 10) and that these documents were before the Board of Appeal when that board considered petitioner's case, even though the duplicates prepared by petitioner were not placed in the file (see R. 42). The following is a list of the documents claimed by petitioner's letter to have been missing and the places where they may be found in the record:

1. Statement attached to questionnaire—Def. Ex. H, R. 214–215.

2. Ministerial certificate from the Watchtower Bible and Tract Society, dated December 24, 1941—Def. Ex. C, R. 192–193.

3. Copy of "Consolation" magazine, No. 569—Def. Ex. D, R. 193–194 (see original exhibit for the text of the magazine).

4. Letters of October 10 and 27, 1942, to the local board— Def. Ex. D, R. 193–194 and Def. Ex. H, R. 213.

5. Letter of October 22, 1942, from the local board—Def. Ex. G, R. 212.

2. *The rejected evidence.*—Petitioner's principal specification of error upon which he predicates his contention that he was denied procedural due process is the refusal of the local board to accept his letter of May 23, 1944, together with the new affidavits which were attached to it (*supra*, p. 13) and to include them in the materials forwarded to the board of appeal for consideration by it in deciding his appeal.[13] Petitioner urges that the local board was obliged to do this on the theory that the letter was a proper request under Section 626.2 of the Selective Service Regulations (*infra*, pp. 33–34) that the local board reopen his classification and consider the additional evidence tendered by petitioner. The opinion of the court below did not reach this question, but the dissenting opinion (R. 294–299) of Judge Biggs took the view that the letter should have been treated as a request to the local board to reopen the classification and that the local board was obliged to act upon it and to place it in petitioner's cover sheet so that it also would be considered by the board of appeal.

We believe that under the Selective Service Regulations petitioner's taking of an appeal deprived the local board's classification of any element of finality and foreclosed petitioner from

[13] Since the affidavits offered to the local board for transmittal to the appeal board in November 1942 (*supra*, p. 11) were included in the documents attached to the letter of May 23, 1944, we shall not undertake to discuss them separately.

demanding that the local board reopen his classification at that time or receive additional evidence for consideration by the board of appeal. As we construe the regulations, the appeal board is required to decide the appeal on the basis of the evidence considered by the local board in making its classification and only after the classification has become final, either by decision on the appeal or by failure to appeal from the local board's classification, is the registrant entitled as of right to demand that the local board entertain an application to reopen the classification for consideration of new evidence. Cf. *Cramer* v. *France*, 148 F. 2d 801, 804 (C. C. A. 9).

The Selective Service Regulations relating to the reception of evidence and the classification of registrants reflect two important considerations. They seek to afford the registrant adequate opportunity to adduce evidence in support of his claim, but at the same time, in recognition of the imperative need for mobilizing manpower in the shortest practicable period, the regulations require that the registrant shall act with reasonable dispatch in presenting his case and in taking his appeal from the local board classification. Thus Section 625.1 (a) (*infra*, pp. 30–31) provides that after the local board has classified the registrant on the basis of the evidence before it, he may as of right request one personal appearance before the board and adduce additional evidence in support of his

claim. If his classification remains unchanged after that hearing, the Act and regulations establish an appellate machinery for the further consideration of the registrant's claim (see Brief for the United States in *Smith* v. *United States*, No. 66, pp. 12–13). The appeal must be taken within ten days after the local board mails its notice of classification (sec. 627.2, *infra*, pp. 36–37). Once the appeal is taken, the regulations impose upon the local board only the responsibility of having the registrant undergo a preinduction physical examination and, if he passes that examination, of forwarding the registrant's file to the appeal board (sec. 627.14, *infra*, pp. 38–39). The regulations make no provision for the reception of new evidence while the appeal is pending, and they specifically provide (sec. 627.24 (b), *infra*, pp. 39–40) that the appeal board shall not receive or consider any information not contained in the record received from the local board, with the exception of the recommendation of the Department of Justice where the registrant claims classification as a conscientious objector and of general information concerning economic, industrial, and social conditions.

Section 626.2 (*infra*, pp. 33–34) in providing for the reopening of a classification refers, we think, to the reopening of a final classification. Until the classification becomes final there is no occasion to reopen it, for it is subject to being

changed on appeal. We think this is implicit in the provision of Section 627.26 (b) (*infra*, p. 40) that the classification of the board of appeal shall be final if no appeal is taken to the President, provided, however, that the local board may thereafter change the classification acting pursuant to the reopening provision of Section 626.2. That the regulations do not contemplate the reopening of a classification which is not final because an appeal is pending is likewise evident from the fact that they make no provision for remanding the case to the local board in a case where, after the appeal is taken, the registrant seeks to have the local board reopen the classification, or for delaying consideration of the appeal pending the determination of the local board as to whether it will reopen the classification.

Our construction of the regulations is supported, as well, by the administrative interpretation of them. We have set forth in Appendix B, *infra*, pp. 42–45, copies of letters and a memorandum of the Selective Service System addressed to the question whether new evidence may be supplied while an appeal is pending, which have been obtained from the files of the Selective Service System. These documents, which, the Selective Service System informs us, are representative of the construction placed upon the regulations by the persons responsible for administering them, take the position, which we urge, that while an

appeal is pending new evidence may not be presented for consideration on the appeal. Rather, the registrant must wait until the appeal is decided and his classification becomes final and then apply to the local board to reopen the classification on the basis of the proffered new evidence.

To accept petitioner's view that, while his appeal was pending and his classification was not yet final, he was entitled to have the local board entertain an application to reopen the classification is to render meaningless the provision of Section 625.1 (*infra*, pp. 30–32), permitting the registrant only one appearance before the local board for the purpose of adducing additional evidence. Moreover, to construe the regulations as petitioner urges is to permit him to present his case piecemeal instead of holding him responsible for performing his part in the selective service procedure by gathering the evidence pertaining to himself and furnishing it to the local board as a basis for its decision in classifying him. Furthermore, to permit the reopening of the classification while the classification is pending on appeal makes possible long delays in the decision of the appeal by successive applications for the reopening of the local board classification. Instead of administrative action in the shortest practicable time as Congress contemplated, the classification procedure would become enmeshed in procedural maneuvers calculated to delay the day of induc-

tion. Cf. *United States ex rel. La Charity* v. *Commanding Officer*, 142 F. 2d 381, 382 (C. C. A. 2); *United States ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, 187–191 (D. N. J.).

If Section 626.2 is to be construed as complementing the other provisions of the regulations relating to the classification of registrants, we think it must be recognized as a remedial device for dealing with those cases where there has been a final classification and thereafter new evidence is discovered or circumstances bearing on the classification materially change. This is not such a case. Petitioner, in our view, was not entitled to have his classification reopened while his appeal was pending. We think this was true whether the appeal was pending for a few weeks, as is the usual case, or whether it was pending for more than a year, as in this case. After the appeal had been decided, petitioner was free to present new evidence to the local board by then requesting the local board to reopen his final classification. Accordingly, we submit that the local board properly declined to entertain petitioner's request to reopen the classification or to forward the materials, presented to it for the first time while the appeal was pending, to the appeal board for initial consideration by that board in deciding petitioner's appeal.[14]

[14] We are unable to agree with petitioner's suggestion (Br. 196–197) that the letter of May 23, 1944, and the documents attached to it might be construed as a statement under Sec-

3. *The local board's letter to the appeal board.*— On July 28, 1944, when the local board forwarded petitioner's selective service cover sheet to the appeal board, the local board's clerk prepared a letter to the appeal board giving the reasons for the local board's classification (Def. Ex. M, R. 223) as follows:

> The above named registrant was classified in Class 1-A by this Board for the following reasons:
>
> Mr. Estep is not listed as a minister in any list yet submitted from National Headquarters of Selective Service.
>
> Although this registrant is not gainfully employed and devotes his time to the min-

---

tion 627.12 of the Selective Service Regulations. That Section provides that "The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." We think petitioner's letter of October 27, 1942 (Def. Ex. H, R. 213), giving notice of appeal and specifying that information before the local board which petitioner believed supported his claim, is such a statement. But we perceive no basis for so treating the letter of May 23, 1944, and the attached affidavits. Assuming that a statement under Section 627.12 may be filed long after the appeal is taken, the material which petitioner offered was new evidence; it was not, as is required by Section 627.12, an attachment to the notice of appeal or questionnaire which performs the function which the assignment of errors performs in an appellate court.

> istry, he does not contribute enough hours to this work to be considered a full-time minister since he works only three days a week in that capacity, and is not justified to a 4–D classification.
>
> This registrant is 21 years of age having been born August 9, 1922, and is also single.

While the Selective Service Regulations do not deal specifically with this situation, we think that the selective service policy is reflected by Section 627.13 (b) (*infra*, pp. 37–38) which provides that where it is necessary for the local board to prepare a written summary of oral evidence which it considered, the board "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision." Accordingly, we agree with petitioner and the dissenting judges (R. 298–299) that it was irregular for the local board to send the letter to the appeal board. But we are unable to agree that this departure assumes the proportions of a denial of due process.

The letter was a summary of what the local board regarded as the pertinent facts in the file. Every factual conclusion which the letter contains is reflected by evidence which was properly before the board of appeal. Thus, while as a matter of policy the letter should not have been written, it conveyed no information to the board of appeal which it would not otherwise have gained by an examination of the evidence before it. Apart

from the fact that the letter was, therefore, an innocuous one, it may be noted that Section 627.24 (b) (*infra*, pp. 39–40) requires that an appeal board in reviewing an appeal shall not consider any information which is not contained in the record received from the local board. Since it must be presumed that the appeal board acted in compliance with this regulation (*Lewis* v. *United States*, 279 U. S. 63, 73; *Koch* v. *United States*, 150 F. 2d 762 (C. C. A. 4), the irregularity assumes insignificant proportions.

If the letter be viewed in the light most favorable to petitioner, it was, at best, incompetent evidence which was received and may have been considered by the appeal board. But a want of due process is not established by merely showing this. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106; *Bilokumsky* v. *Tod*, 263 U. S. 149, 157; cf. *Bridges* v. *Wixon*, No. 788 last Term, decided June 18, 1945. We submit that the letter, though irregular, was not such a departure as to have deprived petitioner of his right to have his case fairly considered by the appeal board. Cf. *Cramer* v. *France*, 148 F. 2d 801, 804 (C. C. A. 9).[15]

[15] Petitioner can derive no comfort from the letters to the local board from state Selective Service Headquarters (Def. Exs. O and P, R. 226–228) censuring the local board for the irregularities in the disposition of petitioner's case. Since State Headquarters twice reviewed petitioner's case and concluded that no action on its part was justified (see Def. Ex. R, R. 233), we think it plain that State Headquarters was disturbed by the delay in handling petitioner's case rather than anything in the case which prejudiced petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
WALTER J. CUMMINGS, JR.,
Attorneys.

NOVEMBER 1945.

APPENDIX A

The Selective Service Regulations particularly pertaining to the questions of procedural due process discussed *supra*, pp. 20–29, were as follows:

623.1. *General principles of classification.*—(a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board. * * *

623.2. *Information considered for classification.*—The registrant's classification shall be made solely on the basis of the Selective Service questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Claim for Deferred Classification by Person Other Than Registrant (Form 42), or Affidavit to Support Claim for Occupational Deferment (Form 42A), and such other written information as may be contained in his file. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.

* * * * *

625.1. *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear

in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of

such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2. *Appearance before local board.*— (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local

board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

625.3. *Induction postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of his local board, and if the registrant requests a personal appearance, he shall not be inducted ~~until 10~~ days after the Notice of Classification (Form 57) is mailed to him by the local board, as provided in paragraph (d) of section 625.2.

* * * * *

626.2. *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon

the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service.

626.3. *Refusal to reopen and consider anew registrant's classification.*—When a registrant, any person who claims to be a dependent of a registrant, any interested party in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered

when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, should advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and should place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

626.11. *When classification reopens, it shall be considered anew.*—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

626.12. *Notice of action when classification considered anew.*—When the local board reopens the registrant's classification, it, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

626.13. *Right of appeal following reopening of classification.*—Each such classification shall be followed by the same right of

appearance before the local board and the same right of appeal as in the case of an original classification.

626.14. *Form 150 and Form 50 to be canceled when classification reopened.*—When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (Form 150) or Order to Report for Work of National Importance (Form 50) which may have been issued to the registrant. If after the registrant's classification is reopened he is classified anew into a class available for service, he shall be ordered to report for induction or for work of national importance under civilian direction, as the case may be, in the usual manner.

* * * * * *

627.2. *Appeal by registrant and others.*—(a) The registrant, any person who claims to be a dependent of a registrant; any person who has filed written evidence of the occupational status of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

* * * * * *

(c) The registrant, any person who claims to be a dependent of the registrant, or any person who has filed written evidence of the occupational status of the registrant may take an appeal authorized under paragraph (a) above at any time within the following periods:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (Form 57); * * *

* * * * * *

627.11. *How appeal to board of appeal is taken.*—(a) Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

(b) The local board shall enter on the Classification Record (Form 100) the date on which an appeal is filed.

627.12. *Statement of person appealing.*—The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13. *Local board to prepare and forward file and DSS Form 66.* * * *

(b) * * * the local board shall attach the Individual Appeal Record (Form 66) to the inside of the registrant's Cover Sheet (Form 53) and shall carefully check the registrant's file to make certain that all steps required by the regulations have been

taken and that the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary, the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

* * * * *

627.14. *Time when record to be forwarded on appeal.*—(a) When an appeal is taken from the classification of a registrant in Class I–A, Class I–A–O, or Class IV–E (except a registrant who, because of being in excess of 38 years of age, is identified with the letter "H" as provided in section 622.81), the file of the registrant shall be held by the local board and shall not be forwarded to the board of appeal or the State Director of Selective Service, as the case may be, until (1) the registrant has been ordered to report for his preinduction physical examination in the usual manner when his order number is reached and (2) the results of the preinduction physical examination have been received by the local board or the registrant has failed to appear for his preinduction physical examination at the time he is ordered to do so. If as a result of the preinduction physical examination such registrant is found to be disqualified for service, his classification shall be reopened and he shall be classified in Class IV–F. In such cases the appeal will not be forwarded.

(b) The registrant's file shall be forwarded to the board of appeal or the State

Director of Selective Service, as the case may be, immediately after the local board has complied with the provisions of section 627.13 when (1) an appeal is taken from the classification of a registrant in a class other than Class I–A, Class I–A–O, or Class IV–E, or (2) the classification of a registrant in Class II–A or Class II–B is submitted for review and decision to a board of appeal under section 627.3, or (3) an appeal is taken from the classification of a registrant in Class I–A, Class I–A–O, or Class IV–E, and such registrant, because of being in excess of 38 years of age, is identified with the letter "H" as provided in section 622.81.

* * * * *

627.23. *Preliminary review.*—The board of appeal will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the board of appeal to determine the classification of the registrant, the board of appeal shall return the file to the local board with proper instructions. If the board of appeal returns the file to the local board, it shall enter the date of the return in column 4 of the Docket Book of Board of Appeal (Form 102).

627.24. *Review by board of appeal.* * * *

(b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except

(1) the advisory recommendation from the Department of Justice under section 627.25, and (2) general information concerning economic, industrial, and social conditions.

* * * * *

627.26 *Decision of board of appeal.*—(a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant; provided that the board of appeal shall not give consideration to Class IV–F because of physical or mental disability.

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

* * * * *

APPENDIX B

Administrative interpretations of the Selective Service Regulations on the question whether new evidence may be presented while an appeal is pending.

1. JANUARY 11, 1941.

STATE DIRECTOR OF SELECTIVE SERVICE
300 Logan Street, Denver, Colorado.

Attention: Major deR. Mowry.

MY DEAR GENERAL RICHARDSON: This is to acknowledge receipt of your letter of recent date propounding the following questions:

* * * * *

(3) In case of an appeal, may the Appeal Agent insert into the record material which is, in his estimation, pertinent to the case, even though the Local Board does not consider such material pertinent?

* * * * *

As to the third question, the Government Appeal Agent or other person appealing the case should have the right to insist upon any pertinent record evidence going up to the Board of Appeal, as a part of the record, provided of course such evidence was in the registrant's file at the time the Local Board made the classification. (See Paragraph 372c.) The disposition of the Local Board should not be to keep from the Board of Appeal any pertinent record information which was in the registrant's file

at the time the Local Board made the classification.

Sincerely yours,

LEWIS B. HERSHEY,
Deputy Director.

AJLewis/mo

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2. JUNE 27, 1941.

STATE DIRECTOR OF SELECTIVE SERVICE,
Armory Drive, Trenton, New Jersey.

Attention: Lt. Col. E. N. Bloomer.

DEAR SIR: We are in receipt of your letter of June 24, 1941, regarding Registrant Hugh Herbert Fiske, of Local Board No. 22, Jersey City, N. J.

You refer in your letter to certain affidavits which have been submitted by the registrant, indicating that there is information to the effect that these affidavits would bear investigation. National Headquarters is in complete accord with your recommendation in this matter. It is our opinion, however, that the file of the registrant in its present form, which has now been passed on by the local board and the board of appeal, should be passed on in the appeal to the President without the addition of any new evidence.

New evidence which you may secure should be submitted to the local board for their consideration after the appeal to the President has been decided. The local board should, at the time such evidence is submitted, reconsider the case in the light of the new evidence. Authority is granted to reclassify the registrant upon the basis of new evidence.

In the event such new evidence is submitted to the local board and the registrant

is reclassified, it is requested that this headquarters be advised as to this classification, and the reason thereor.

For the Deputy Director,

CARLTON S. DARGUSCH,
Lt. Col., JAGD, Executive.

RPDavidson: EH.

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3. MAY 7, 1941.

Major James N. Keelin, Jr., Planning Council.
Major Shattuck.
Appeal No. 26—Palmer Winthrop Cheney.

You inquire whether or not evidence presented to the local board on April 15, 1941 may be considered upon this appeal to the President. The decision of the local board classifying the registrant in Class I–A was made on March 10, 1941. Upon appeal to the board of appeal, this classification was affirmed on March 14, 1941. It is from these decisions that an appeal is now taken to the President. The new evidence in question was not called to the attention of the local board until after both the local board and the board of appeal had rendered their respective decisions. There are no provisions in the regulations for presentation of new evidence to either the board of appeal or to the President. All new evidence must be presented to the local board and the local board shall determine from such new evidence whether or not it should reclassify the registrant. It is therefore clear that the evidence added to the record subsequent to the decision of the local board and never given consideration by the local board as a basis for classification may not properly be considered in the decision

either to the board of appeal or the President.

Under such circumstances the proper procedure is to return the records to the local board with instructions to the local board to consider the new evidence and to determine whether or not in the light of such new evidence the registrant should be reclassified. Under our present procedure, if the local board determines not to reclassify the registrant and continues his classification, the registrant has no right of appeal. The attitude of the local board in this particular case indicates that the local board would not change its classification even though these new facts were before it, although it is clear that such facts warrant the registrant being reclassified in Class III.

There is an additional difficulty in that the appeal from the original decision of the local board and the board of appeal is properly before the President. He would, therefore, in any event be required to determine the appeal on the facts properly before him. From a careful review of the file, it would seem to me that, without regard to the additional new evidence introduced, the President would classify the registrant in Class III anyway. If this decision is reached, it would be possible to state that, while these new facts are in the file, independent of them and without considering them, the President had determined to place the registrant Class III.

* * * * * *

EDWARD S. SHATTUCK.

ESS/mm.
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SUPREME COURT OF THE UNITED STATES.

Nos. 292 and 66.—October Term, 1945.

William Murray Estep, Petitioner, 292 *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Louis Dabney Smith, Petitioner, 66 *vs.* The United States of America.	Court of Appeals for the Fourth Circuit. On Writ of Certiorari to the United States Circuit

[February 4, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

In *Falbo* v. *United States*, 320 U. S. 549, we held that in a criminal prosecution under § 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. § 311) a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance.[1] We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under § 11 where he reported for induction, was finally accepted, but refused to submit to induction.

Estep's local board classified him as I-A, i. e., as available for military service.[2] Sec. 5(d) of the Act exempts from training and service (but not from registration) "regular or duly ordained ministers of religion." Under the regulations those in that category are classified as IV-D.[3] Estep, a member of Jehovah's Witnesses, claimed that he was entitled to that classification. The local board

1 Sec. 5(g) of the Act provides that a registrant shall "be assigned to work of national importance under civilian direction" if he is conscientiously opposed to induction into the armed services even for noncombatant service. See Selective Service Regulations, 652.1-652.14, 653.1-653.16.

2 Selective Service Regulations, 622.11.

3 *Id.*, 622.44.

ruled against him. He took his case to the appeal board which classified him as I-A.[3] He then asked the State and National Directors of Selective Service to appeal to the President for him.[5] His request was refused. The local board thereupon ordered him to report for induction. He reported at the time and place indicated. He was accepted by the Navy. But he refused to be inducted, claiming that he was exempt from service because he was an ordained minister of the gospel.

He was indicted under § 11 of the Act for wilfully failing and refusing to submit to induction.[6] He sought to defend on the ground that as a Jehovah's Witness he was a minister of religion and that he had been improperly denied exemption from service, because the classifying agencies acted arbitrarily and capriciously in refusing to classify him as IV-D. He also claimed that his right to an effective appeal had been denied because the local board unlawfully withheld certain relevant documents from the appeal board and included improper material in the record on appeal. The District Court rejected these defenses and did not permit the introduction of evidence to sustain Estep's contention. The jury found him guilty and he was sentenced to imprisonment for a term of five years. On appeal the Circuit Court of Appeals affrmed, on a divided vote. 150 F. 2d 768.

Smith, like Estep, is a member of Jehovah's Witnesses. He claimed exemption from all service on the ground that he was a minister of religion. His local board placed him in Class I-A, as available for military service. His classification was affirmed by the appeal board. On appeal to the President his classification was

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[4] By § 10(a)(2) of the Act the President was authorized to establish "civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act." The provisions governing appeals to the boards of appeal are contained in 627.1-627.61 of the Regulations. The Act provides a special appeal procedure for conscientious objectors. See § 5(g).

[5] Either of them may take such an appeal at any time when he "deems it to be in the national interest or necessary to avoid an injustice." Selective Service Regulations, 628.1. A registrant may appeal to the President when he is classified as I-A provided one or more of the board of appeal dissented from such classification. *Id.*, 628.2. In Estep's case the board of appeal was unanimous in classifying him in I-A.

[6] Sec. 11 so far as material here provides "any person . . . . who shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

again affirmed. The local board then ordered him to report for induction. He reported to the induction station, was accepted by the military, but refused to be inducted, claiming he was exempt from service because he was a minister. He was inducted against his will and later was held for trial by a general court-martial for disobedience of military orders. He filed a petition for a writ of *habeas corpus* which was denied. *Smith* v. *Richart*, 53 F. Supp. 582. While his appeal was pending, we decided *Billings* v. *Truesdell*, 321 U. S. 542. He was thereupon released from military custody and indicted for violation of § 11 of the Act. At the trial he sought to attack the classification given him by his local board, claiming, among other things, that it acted without any foundation of fact, discriminated against him because he was a Jehovah's Witness, and denied him the right to make full proof of his claim that he was a minister of religion. The court ruled that no such defense could be tendered. Smith was found guilty by the jury and a sentence of three and one-half years was imposed. The judgment of conviction was affirmed on appeal. 148 F. 2d 288.

The cases are here on petitions for writs of certiorari which we granted because of the importance of the question presented.

Congress entrusted the administration of the Selective Service System to civilian agencies, not to the military. It authorized the President to create and establish a Selective Service System and to establish civilian local boards and appeal boards to administer it. § 10(a)(2). The Selective Service System was designed to "provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service." *Id.* Congress specified certain restricted classes for deferment[7] or exemption from service, including in the latter, as we have said, "regular or duly ordained ministers of religion." § 5. The President was authorized to provide for the deferment of other classes by rules and regulations.[8] § 5(e). And the local boards "under rules and regulations prescribed by the President" were granted the "power within their respective jurisdictions to hear

[7] Thus by § 5(e)(1) specified classes of public officials were deferred from training and service while holding their offices.

[8] The regulations placed in deferred classifications those whose employment in industry, agriculture, or other occupations or whose activity was found to be necessary to the maintenance of the national health, safety, or interest; those who had persons dependent on them for support; those found to be physically, mentally, or morally deficient or defective. See Selective Service Regulations 622.21, 622.25-1, 622.32, 622.61, 622.62.

and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards." § 10(a)(2). The Act makes no provision in terms for judicial review of the actions of the local boards or the appeal boards. For § 10(a)(2) states that the "decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."[9]

By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure to perform any duty required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction. *Billings* v. *Truesdell*, *supra*, p. 557. Sec. 11 confers jurisdiction on the district courts to try one charged with such offense. But § 11 is silent when it comes to the defenses, if any, which may be interposed.

Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Gegiow* v. *Uhl*, 239 U. S. 3; *Stark* v. *Wickard*, 321 U. S. 288. Judicial review may indeed be required by the Constitution. *Ng Fung Ho* v. *White*, 259 U. S. 276. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress choses.

[9] The part of § 10(a)(2) relevant here provides: "Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. Their authority to hear and determine all questions of deferment or exemption is, as stated in § 10(a)(2), limited to action "within their respective jurisdictions." It is only orders "within their respective jurisdictions" that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tang* v. *United States*, 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations. Since § 10(a)(2) makes the decisions of the local boards final "except where an appeal is authorized" under the regulations, the defense was allowed in the criminal trial.

Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction[10] does not stand on a different footing. By § 10(a)(2) the local boards in hearing and determining claims for deferment or exemption must act "under rules and regulations prescribed by the President." Those rules limit, as well as define, their jurisdiction. One of those regulations forbids the local boards from basing their classification of a registrant on a discrimination "for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization." 623.1. Another provides, in accordance with the mandate contained in § 5(g)(1) of the Act, for the deferment of governors of States and members of Congress while they hold their offices.[11] 622.42. Another provides that the local board "shall reopen and consider anew the classification of a registrant" on the written request of the State Director or the Director and upon receipt of the request "shall immediately cancel" any order to report for induction or for work of national importance. 626.2-4. If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. If a local board refused to reopen on the written re-

[10] See cases cited in note 14, *infra*.

[11] 622.42 provides, "In Class IV-B *shall be placed* any registrant" who holds specified offices. (Italics added.)

quest of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction.

We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony.[12] A felon customarily suffers the loss of substantial rights.[13] Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loathe to resolve those doubts against the accused. We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loathe to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused. The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which

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[12] "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." Criminal Code § 335, 18 U. S. C. § 541.

[13] *California*: § 2600 of the Penal Code provides that a sentence of imprisonment for less than life suspends all civil rights and forfeits all public offices and private trusts, authority, or power during the imprisonment.

New York: For a similar provision see § 510 of the Penal Code LAW.

Missouri: § 4561 Rev. Stat. Ann. renders any person sentenced to a penitentiary or convicted of a felony for any crime incompetent to serve as a juror, and forever disqualfies him from voting or holding office, unless pardoned.

it gave the registrant.[14] See *Goff* v. *United States*, 135 F. 2d 610, 612.

Falbo v. *United States*, *supra*, does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them.[15]

If § 11 were not construed to permit the accused to defend on the ground that his local board acted beyond its jurisdiction, a curious result would follow. The remedy of *habeas corpus* extends to a case where a person "is in custody in violation of the Constitution or of a law . . . of the United States." R. S. § 753, 28 U. S. C. § 453. It has been assumed that *habeas corpus* is available only after a registrant has been inducted into the armed services.[16] But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by

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[14] That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation "final". Chin Yow v. United States, 208 U. S. 8; Ng Fung Ho v. White, *supra*; Mahler v. Eby, 264 U. S. 32; Vajtauer v. Commissioner, 273 U. S. 103; Bridges v. Wixon, 326 U. S. 135. That is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus*. See United States v. Cain, 144 F. 2d 944.

[15] It is said that our conclusion runs counter to an unbroken line of cases holding that a registrant may not challenge his classification in a prosecution under § 11. But most of those cases on their facts involved only the issue presented by the *Falbo* case. In only a few of them was the issue presented here necessary for decision. The question was reserved in United States v. Pitt, 144 F. 2d 169, 173 (C. C. A. 3d, 1944). In the following cases, the question was necessary for decision; and it was held that the defense was not available; Fletcher v. United States, 129 F. 2d 262 (C. C. A. 5th, 1942); United States v. Rinko, 147 F. 2d 1 (C. C. A. 7th, 1945); Gibson v. United States, 149 F. 2d 751 (C. C. A. 8th, 1945); Koch v. United States, 150 F. 2d 762 (C. C. A. 4th, 1945).

[16] See United States v. Grieme, 128 F. 2d 811; United States v. Kauten, 133 F. 2d 703; United States v. Mroz, 136 F. 2d 221; Biron v. Collins, 145 F. 2d 758; Fujii v. United States, 148 F. 2d 298; Gibson v. United States, 149 F. 2d 751. See Connor and Clarke, Judicial Investigation of Selective Service Action, 19 Tulane L. Rev. 344; Elliff, Jehovah's Witnesses and the Selective Service Act, 31 Va. L. Rev. 811.

habeas corpus.[17] The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow.

We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that *habeas corpus* after conviction is available in these cases gives added support to our reading of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.

We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

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[17] The courts which have said that *habeas corpus* was available only after induction (see note 16, *supra*) appear to have been influenced by the decisions arising under the 1917 Act, 40 Stat. 76, 50 U. S. C. App. § 201. Thus in United States *v.* Grieme, *supra*, note 16, p. 814, the court in ruling that the findings of the local boards were not reviewable by the courts said, "Here again the rule is similar to the construction placed upon the Selective Draft Act of 1917. See *Ex parte Hutfils*, 245 F. 798, 799." The latter case involved a petition for a writ of *habeas corpus* after induction, which was the accepted way of challenging the jurisdiction of the draft boards under the 1917 Act. But as we pointed out in Billings *v.* Truesdell, *supra*, p. 546, a registrant under the 1917 Act was subject to military law from the time he was ordered to present himself for induction. Defiance of the order was held to constitute desertion even though the draftee had not been afforded a fair hearing by the board. Ex parte Romano, 251 F. 762; Ex parte Tinkoff, 254 F. 912. It was said in Ex parte Romano, *supra*, p. 764: "Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner."

But as Billings *v.* Truesdell, *supra*, makes plain, the present Act and the regulations promulgated under it are different. A registrant is not subject to military law from the time he is ordered to report for induction, but only after he has submitted to induction. Thus the decisions under the 1917 Act, holding that his remedy against unlawful action of the local board is by way of *habeas corpus* after induction, are no guide to decision under the present Act.

It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of *habeas corpus* was denied. 141 F. 2d 689. And in a like situation *habeas corpus* was denied in advance of the trial. Albert *v.* Goguen, 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of *habeas corpus* followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See Bowen *v.* Johnston, 306 U. S. 19; Ex parte Williams, 317 U. S. 604; Ex parte Hawk, 321 U. S. 114. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end.

Mr. Justice FRANKFURTER, concurring in result.

Although Congress, in 1940, and by reenactment since, provided that when a draft board determines whether a registrant is entitled to exemption or deferment the board's decision is "final," the Court now concludes that such a decision is not final but may be reviewed when the registrant is tried before a jury for wilful disobedience of a board's order. Not only is such a result opposed to the expressed will of Congress. It runs counter to the achievement of the great object avowed by Congress in enacting this legislation; it contradicts the settled practice under the Selective Service Act throughout the war years, recognized as such by authoritative Congressional opinion; it reverses all the circuit courts of appeals before whom the matter has come, constituting an impressive body of decisions and expressing the views of more than forty judges.

The case is this. Estep was a Jehovah's Witness. By virtue of that fact he claimed the protection of § 5(d) of the Selective Training and Service Act of 1940 (54 Stat. 885, 888; 50 U. S. C. App. § 305(d)), which exempts from service "Regular or duly ordained ministers of religion . . . . . " His local board ruled against this claim and classified Estep as I-A, that is, available for military service; and ordered him to report for induction. He reported and was accepted by the Navy but refused to submit to induction. See *Billings* v. *Truesdell*, 321 U. S. 542. This prosecution was then commenced under § 11 of the Act (54 Stat. 885, 894; 50 U. S. C. App. § 311). That section makes it an offense for any person wilfully to disobey "any of the provisions of this Act, or the rules or regulations made or directions given thereunder . . . ." Concededly Estep failed to carry out the order of the board to submit to induction. Estep sought to defend disobedience on the ground that the local board had improperly denied his claim of exemption from service in that they refused to classify him as a "regular or duly ordained minister of religion." He also offered in defense proof of alleged misconduct by the board bearing on his right of appeal from the board's decision. Disallowance of these defenses by the district court, which after conviction were sustained by the Circuit Court of Appeals presents two issues for our consideration: I. Is the decision of a local board denying a claim of exemption subject to reconsideration in a criminal prosecution for knowingly failing to perform that duty required by the Act as a result of such classification? II. Is

action by the local board whereby a registrant is cut off from the opportunities of a review within the Selective Service process as authorized by the Act available as a defense in such prosecution for disobedience of the local board's order? These are questions of such moment in the enforcement of the Selective Service Act as to call for an adequate statement of the reasons that impel disagreement with the major conclusion of the Court.

I.

Did Congress place within the Selective Service System the authority for determining who shall and who shall not serve in the armed services, who shall and who shall not enjoy the exemptions and deferments by which Congress has qualified the duty of all to serve? Or, did it leave such determination for reconsideration in trials before juries of persons charged with wilful disobedience of duties defined by the Act? This is the crucial question in the case and touches the very nerve-center of the Selective Service Act.

One would suppose the Congress expressed its will with great clarity, precluding the need of labored argumentation as to its purpose. Section 10(a)(2) gives the answer:

> "Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local board. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." 54 Stat. 885, 893; 50 U. S. C. App. § 310(a)(2).

These words can only mean what they appear to mean if they are read as ordinary words should be read. Ordinary words should be read with their common, everyday meaning when they serve as directions for ordinary people. If legislation was ever designed to define the rights and duties of the vast body of ordinary people, it is the Selective Service Act. One need not italicize "final" to make final mean final, when nowhere in the Act is there any derogation of this Congressional command of finality to "the decisions of such local boards," subject only to reviewability within the Selective Service System.

But if one goes beyond the meaning that the text spontaneously yields, all other relevant considerations only confirm what the

text expresses. To allow judicial review of a board's decision on classification is not to respect the context of purpose into which a specific provision of a law is properly placed. To do so disregards that purpose. And Congress did not rely on the public understanding of the purpose that moved it in passing the Selective Service Act, as well it might have considering that the Act was passed in September, 1940. It was explicit: "The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States." § 1(a). 54 Stat. 885; 50 U. S. C. App. § 301(a).

There cannot have been many instances in our national life when Congress stamped its legislation as "imperative." And history has amply underscored the desperate urgency. Congress deemed it imperative to secure a vast citizen army with the utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established, for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service. As to such legislation, even where the language is not explicit, every provision of the Act should be construed to promote fulfilment of the imperative need which inspired it. Surely it would hamper the aim of Congress to subject the decisions of the selective process in determining who is amenable to service to reconsideration by the cumbersome process of trial by jury, admirably suited as that is for the familiar controversies when the nation's life is not at stake. To avoid such a palpable inroad upon Congressional purpose, we need not draw on implications. We must merely resist unwarranted implications to sterilize what Congress has expressly required.

In construing the Act, this Court has heretofore applied the reasons which led Congress to rely wholly on the Selective Service System in determining the rights of individuals. This is what we said two years ago:

> "To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process."

We so ruled in *Falbo v. United States*, 320 U. S. 549, 554. That was a case in which we held that a challenge to a local board's classification cannot be raised upon a trial like the present for vio-

lation of the Court's order, where the registrant disobeys the order before he is accepted for national service. But the Congress made the decisions of the board "final" without regard to the stage at which the registrant disobeys it. The command of Congress makes the decision of the board no less final after the registrant has submitted to the pre-induction examination than before such submission. The finality of the board is neither diminished, nor the authority of the courts to review such decision enlarged, because a registrant flouts the Selective Service process at an early or at a late stage. The language of the statute is unqualified and all-inclusive: "The decision of such local board shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Such has been the construction of more than forty judges in the circuit courts of appeals.[1] The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Circuits. All eight of them have ruled that judicial review of draft board classifications is not available in a criminal prosecution, even though the registrant has submitted to the pre-inductive physical examination. *Sirki* v. *United States*, 145 F. (2d) 749 (C. C. A. 1st, 1944); *United States* v. *Flakowicz*, 146 F. (2d) 874 (C. C. A. 2d, 1945); *United States* v. *Estep*, 150 F. (2d) 768 (C. C. A. 3d, 1945); *Smith* v. *United States*, 148 F. (2d) 288 (C. C. A. 4th, 1945); *Koch* v. *United States*, 150 F. (2d) 762 (C. C. A. 4th, 1945); *Fletcher* v. *United States*, 129 F. (2d) 262 (C. C. A. 5th, 1942); *Klopp* v. *United States*, 148 F. (2d) 659 (C. C. A. 6th, 1945); *United States* v. *Rinko*, 147 F. (2d) 1 (C. C. A. 7th, 1945); *Gibson* v. *United States*, 149 F. (2d) 751 (C. C. A. 8th, 1945).[2] Such was the impact of this Court's

[1] This is a list of the judges:—
First Circuit: Mahoney, Woodbury, Peters.
Second Circuit: Learned Hand, Swan, Augustus N. Hand, Chase, Clark, Frank, Simons, Hutcheson (the last two sitting as designated judges).
Third Circuit: Jones, Maris, Goodrich, McLaughlin, Parker (the last sitting as a designated judge).
Fourth Circuit: Parker, Soper, Dobie, Northcott.
Fifth Circuit: Sibley, Hutcheson, Holmes, McCord, Waller, Lee, Strum.
Sixth Circuit: Hicks, Simons, Hamilton, Martin.
Seventh Circuit: Evans, Sparks, Major, Kerner, Minton, Lindley, Briggle.
Eighth Circuit: Sanborn, Woodrough, Thomas, Johnsen, Riddick.
Since *Falbo*, the only contrary views have been expressed by Judges Biggs and Leahy, in the court below in No. 292.

[2] See, also, *United States* v. *Kauten*, 133 F. (2d) 703 (C. C. A. 2d, 1943); *United States* v. *Nelson*, 143 F. (2d) 584 (C. C. A. 2d, 1944); *United States* v. *Grieme*, 128 F. (2d) 811 (C. C. A. 3d, 1942); *United States* v. *Bowles*, 131 F.

reasoning in the *Fulbo* case that it greatly influenced the ruling of the Circuit Courts of Appeals as to the finality of local board orders and practically silenced whatever doubts theretofore may have been held by a few of the judges.

That it was during the crucial war years that the Act was thus interpreted and enforced and whereby the raising of the armed forces was saved from obstruction by not subjecting the Selective Process to judicial review when Congress forbade it, is of course no reason for misconstruing it now and relaxing the mode of administration which Congress deemed necessary for its effectiveness.

Congress not only so willed but those especially entrusted with formulating this legislation were fully aware of the judicial consequences of what it prescribed. This is shown by an authoritative report of the House Committee on Military Affairs when that Committee, the originator of the Act, was considering amendments on renewal of the Act. In its report in January, 1945, more than four years after the Act had been in operation, the Committee thus stated with accuracy and acquiescence the unanimity of judicial decisions in support of the respect by the judiciary of finality of the decisions of the draft board:

> "Under the Act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusal in a criminal prosecution on the ground that their classifications were not given fair consideration by their boards. In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus." H. R. Rep. No. 36, 79th Cong., 1st Sess. (1945) 4-5.

Congress wanted men to get into the army, not to litigate about getting in. And so it legislated on the assumption that it carefully devised a scheme for determining within the Selective Service System who was under duty to serve in the army would go awry too seldom to justify allowance of review by the courts.

(2d) 818 (C. C. A. 3d, 1942); *aff'd on other grounds*, 319 U. S. 33; *Goodrich* v. *United States*, 146 F. (2d) 265 (C. C. A. 5th, 1944); *United States* v. *Mroz*, 136 F. (2d) 221 (C. C. A. 7th, 1943); *United States* v. *Messersmith*, 138 F. (2d) 599 (C. C. A. 7th, 1943); *United States* v. *Daly*, 139 F. (2d) 7, (C. C. A. 7th, 1943); *United States* v. *Sauler*, 139 F. (2d) 173 (C. C. A. 7th, 1944); *United States* v. *Van Den Berg*, 139 F. (2d) 654 (C. C. A. 7th, 1944); *United States* v. *Fratrick*, 140 F. (2d) 5 (C. C. A. 7th, 1944); *United States* v. *Baxter*, 141 F. (2d) 359 (C. C. A. 7th, 1944); *United States* v. *Domres*, 142 F. (2d) 477, (C. C. A. 7th, 1944); *Bronemann* v. *United States*, 138 F. (2d) 333 (C. C. A. 8th, 1943); *Vag Bibber* v. *United States*, 151 F. (2d) 444 (C C. A. 8th, 1945).

If challenges to such determination by the Selective Service System were found baseless, as they were so found as a matter of experience in all but a negligible number of instances, the men having submitted to induction would be in the army, available as such, and not in prison for disobedience. Accordingly, Congress legislated to discourage obstruction and delay through dilatory court proceedings that would have been inevitable if judicial review of classification had been afforded during the war years.

The Court finds support for its reading that "final" does not mean final in the fact that not even at a time of our greatest national emergency was the writ of *habeas corpus* withdrawn as an alternate safeguard of personal liberty. See U. S. Constitution, Art. I, § 9, cl. 2; 1 Stat. 81; as amended, 28 U. S. C. § 451. But this general right to question the want of any legal foundation for any restraint is no measure of the issues that Congress left open for determination in a jury trial for disobedience of orders of the local draft boards made "final" by § 10(a)(2). Still less can it justify nullification of an explicit direction by Congress that such orders shall finally be determined within the framework of the Selective Service System. The issues in a *habeas corpus* proceeding are quickly joined, strictly limited and swiftly disposed of by a single judge. *Habeas corpus* proceedings are freed from the cumbersomeness which is a proper price to pay for the countervailing advantages of jury trials in appropriate situations. *Habeas corpus* "comes in from the outside," after regular proceedings formally defined by law have ended, "not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." Holmes, J., dissenting in *Frank* v. *Mangum*, 237 U. S. 309, 346. *Habeas corpus*, after conviction, could not, of course, serve as a revisory process of the determination of classification which Congress lodged with finality in the draft boards. It could only be used in those hardly conceivable situations in which the proceedings before the draft board were a mere sham, "nothing but an empty form." *Ibid.* The availability in such a remote contingency of *habeas corpus* even after conviction is certainly no reason for deflecting and confusing a trial for the simple issue defined by § 11, namely, whether there was a wilful disregard of an order made by the Selective Service System, a system ranging from the local board to the President. It is one thing for the writ of *habeas corpus* to be available even though an administrative

action may otherwise be "final." See *e. g., Ng Fung Ho* v. *White*, 259 U. S. 276. It is quite another to disrupt a whole scheme of legislation under which millions of orders need promptly to be made and promptly to be respected and were therefore endowed with finality when sanctions for disobedience are sought.

Another ground for denying the evident purpose of Congress and disregarding the terms in which it expressed that purpose, is the suggestion that the validity of a classification goes to the "jurisdiction of the board" to issue an order to report for induction. But Congress did not say that "the decision of such local boards *when properly acting under their authority* shall be final." It said simply and unqualifiedly "the decisions of such local board shall be final." To be sure local boards are given power to act "within their respective jurisdictions." But all agencies upon which Congress confers authority have such authority impliedly only "within their respective jurisdiction." If that inherent limitation opened the door to review of their action in every enforcement proceeding despite provisions for finality, a provision of finality is meaningless.

This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of "jurisdictional fact." In view of the criticism which that doctrine, as sponsored by *Crowell* v. *Benson*, 285 U. S. 22, brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose. In withholding judicial review in the situations with which we are concerned, Congress was acting upon the conviction that it was dealing with matters which were more fittingly lodged in the exclusive discretion of the Selective Service System. Even in cases of far less exigency, Congress has chosen to act on such a view. See, *e. g., Gray* v. *Powell*, 314 U. S. 402; *Final Report of the Attorney General's Committee on Administrative Procedure* (1941) 86. But the short answer to any claim of reviewability drawn from the confinement of the local boards to action "within their respective jurisdictions" is that Congress was concerned with geography and not with law. Throughout this Act, the term "jurisdiction" has this geographic connotation. Is it reasonable to believe that Congress, bent on creating a vast armed force as quickly as possible, would in effect authorize every order of the Selective Service System to be reconsidered upon trials for disregard of such orders? The Act does not differentiate between

the power of the Board to allow exemptions and its power to grant deferments. The boards were invested with final authority to determine such matters subject only to such review as the Act authorizes. When Congress talked about a board acting within its jurisdiction it meant that a registrant had submitted his papers to a board either because he resided within its area or for some other relevant reason had registered with it.

For five years the circuit courts of appeals have construed § 10(a)(2) to mean that Congress established a system for organizing a vast citizen's army, the selection of which shall be in civilian boards with such control over them as the President may formulate. Designed obstruction of this means of meeting the great emergency was made an offense. That the Congress had the Constitutional power to do so needs no argument at this late date. See *Selective Draft Law Cases*, 245 U. S. 366; *Hirabayashi* v. *United States*, 320 U. S. 81, 93. And yet the Court today holds that eight circuit courts of appeals were wrong in reading the language of Congress as Congress wrote it, even though in doing so these courts were respectful of the considerations that moved Congress to write the Act as it did in order to raise that army. If this be so, not only were they wrong, but hundreds of convictions for disobedience of local board orders based on such regard for what Congress had written, were invalid.

II.

Since Congress has made final the decision of a local board on a claim of exemption, its decision as to exemption cannot be reopened upon a trial for disobedience of the board's order. But Congress also authorized an appeal from the local board to an appeal board and ultimately to the President. Congress has not given to the local board authority to decide when such statutory rights of appeal may be availed of, nor to make "final" unwarranted action by a board whereby such appeal is frustrated. *Cf. Tung* v. *United States*, 142 F. (2d) 919 (C. C. A. 1st, 1944). Accordingly, if a registrant does not obey an order of induction because the board has cut off the opportunity which the statutes gives him to appeal to higher authority, his obligation of obedience has not yet been fixed. Therefore he has not failed to discharge his obligation under the Act. The duty to obey is not merely a duty to obey an order of the draft board, but to obey such an order after it is no longer subject to review within the Selective Service System. "The decisions of such local draft boards shall

be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Estep made the claim that he was effectively denied the right to appeal in addition to his inadmissible defense that the local board classified him improperly. He offered to prove that for all practical purposes the local board frustrated his right to have his case go to the appeal board, in violation of the board's duty under the Act and the Regulations. Estep should have been allowed to make proof of this claim by appropriate motion to be disposed of by the court. As in situations of comparable legal significance, a trial court may of course leave controverted issues of fact to the jury.

Another issue is presented by the petitioner in No. 66. The indictment alleges a failure to report for induction. While the petitioner did not report at the local board as he was ordered to do, he was forcibly taken to the induction center and went through the pre-induction physical examination but subsequently refused to submit to induction. An order to report for induction, as we said in *Billings* v. *Truesdell*, "includes a command to submit to induction." 321 U. S., at 557; *United States* v. *Collura*, 139 F. 2d 345 (C. C. A. 2d, 1943). There is basis for the petitioner's contention that the case was tried and submitted to the jury on the theory that he failed to show up at his local board. He substantially complied with that request by being at the induction center for examination. The trial court's charge is at best ambiguous. The court more than once apparently charged not that he did not submit to induction, but that he failed to appear voluntary at the induction points. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, — U. S. — (January 28, 1946). On this ground the conviction is properly reversed.

Mr. Justice MURPHY, concurring.

To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order. That is a proposition to which I cannot subscribe. It violates the most elementary and fundamental concepts of due process of law. It condemns a man without a full hearing and a consideration of all of his alleged defenses. To

sanction such a proposition is to place an indelible "blot upon our jurisprudence and civilization," *McVeigh* v. *United States*, 11 Wall. 259, 267, which cannot be justified by any appeal to patriotism or wartime exigencies.

The two courts below condemned the petitioners to prison for failing to obey orders to report for induction into the armed services, which had previously found them physically fit. Petitioners do not deny that they disobeyed these orders. They do claim, however, that there was a singular lack of procedural due process in the issuance of the induction orders and that the orders were therefore invalid—claims that must be assumed to be true for purposes of the cases before us. But the courts below, relying upon *Falbo* v. *United States*, 320 U. S. 549, forbade them from raising such claims. Under that view, it is irrelevant that the petitioners had never had a prior opportunity and will never have a future chance to test these claims; it is likewise immaterial that the claims, if proved, might completely absolve them from liability. Thus the stigma and penalties of criminality attach to one who wilfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice. The mere statement of such a result is enough to condemn it.

The reasons advanced for thus depriving the petitioners of their liberty without due process of law are unmeritorious.

First. It is said that Congress so designed the Selective Training and Service Act of 1940 as to preclude courts from inquiring into the validity of an induction order during the course of a prosecution under § 11 for a wilful failure to obey such an order. But if that is true, the Act is unconstitutional in this respect. Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this

Court has previously said: "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52. This principle has been applied many times in the past for the benefit of corporations. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 486; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 432; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. I assume that an individual is entitled to no less respect.

But the Act need not be construed so as to reach this unconstitutional result. Nothing in the statute commands courts to shut their eyes to the Constitution or to deny a full and fair hearing when performing their functions under § 11 and we should be unwilling to imply such a prohibition. Once the judicial power is properly invoked under § 11, a court has unquestioned authority under the Constitution and the Judicial Code to accord a defendant due process of law and to inquire into alleged deprivations of constitutional rights despite the absence of any specific authority under the Act to that effect. A contrary result certainly is not dictated by the fact that the Act makes local board decisions "final," subject to the administrative appeal provisions. This merely determines the point of administrative finality, leaving to the courts the ultimate and historical duty of judging the validity of the "final" administrative orders which they are called upon to enforce with criminal sanctions, at least where no other method of judicial review is previously available.

A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment to the Act. It is simply a recognized use of the interpretative process to achieve a just and constitutional result, coupled with a refusal to ascribe to Congress an unstated intention to cause deprivations of due process.

Second. It is urged that the purpose and scheme of the legislative program necessitate the foreclosure of a full hearing in a criminal proceeding under § 11. The urgent need of mobilizing the manpower of the nation for emergency purposes and the dire consequences of delay in that process are emphasized. From this premise it is argued that no "litigious interruption" in the selective process can be tolerated and that judicial inquiry into the valid-

ity of an induction order during the course of a criminal proceeding is a prime example of a "litigous interruption."

This argument, which was pressed so urgently and successfully in the *Falbo* case, conveniently ignores the realities of the situation. The selective process, in relation to the petitioners, was finally and completely interrupted at the time when they disobeyed the induction orders and subjected themselves to possible criminal liability. Any subsequent judicial review of the induction orders could have no possible effect upon the continuance of the selective process and could bear no earmarks of a "litigous interruption." Thus at the time of petitioners' trials the courts were confronted with accomplished interruptions rather than with a theory. A decision at that point to grant petitioners full hearings and to protect their constitutional rights would simply be a recognition of the fact that the Constitution protects the petitioners whenever their liberty is at stake, whatever may have been their motives in disobeying the orders.

It is alleged, of course, that to allow a full hearing in a criminal proceeding under this Act would be to extend an open invitation to all inductees to disobey their induction orders and litigate the validity of the orders in the subsequent trials. This is at best a poor excuse for stripping petitioners of their rights to due process of law. Moreover, the degree to which judicial review at this stage would encourage disobedience of induction orders lies in the realm of conjecture and cannot be demonstrated one way or the other by proof. But common sense would indicate that the number of those willing to undergo the risk of criminal punishment in order to test the validity of their induction orders with the attendant difficulties of proof, would be extremely small. Adherence to due process of law in criminal trials is unlikely to impede the war effort unduly. And should perchance the opposite be true there are undoubtedly legislative means of combating the problem.

Third. The further suggestion is made that the only judicial review of induction orders available is by means of habeas corpus proceedings brought subsequent to induction and that this remedy satisfies whatever judicial review may be required by the Constitution. I fully concur in the desirability and necessity of such a proceeding for those who have been inducted and who wish to test the validity of their induction orders.

It should be noted in passing, however, that this remedy may be quite illusory in many instances. It requires one first to enter the

armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial procedure. No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition. But even if a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military, at a moment's notice into another jurisdiction, thus making the proceeding moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees.

But the availability of judicial review through habeas corpus proceedings misses the issue in this case. Such a proceeding may or may not provide an adequate remedy for the person who has been inducted. We are dealing here, however, with two persons who have not been inducted and who never will be inducted by force of the orders under attack. The writ of habeas corpus following induction is thus a completely non-existent remedy so far as these petitioners are concerned. It neither adds to nor detracts from the reasons for granting judicial review in these criminal proceedings.

If, as I believe, judicial review of some sort and at some time is required by the Constitution, then when and where can these petitioners secure that review? They have not had a prior chance to obtain review of the induction orders; nor will they subsequently be accorded the opportunity to test their contentions in court. It is no answer that they should have pursued different courses of action and secured writs of habeas corpus after induction. Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious.

By denying judicial review in this criminal proceeding, the courts below in effect said to each petitioner: You have disobeyed an allegedly illegal order for which you must be punished without the benefit of the judicial review required by the Constitution, although if you had obeyed the order you would have had all the judicial review necessary. I am at a loss to appreciate the logic or justice of that position. It denies due process of law to one who is charged with a crime and grants it to one who is obedient. It closes the door of the Constitution to a person whose liberty is at stake and whose need for due process of law is most acute. It short, it condemns a man without a fair hearing.

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicates otherwise. The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment. Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril. The need for their application in this instance seems beyond dispute.

We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values. In this instance it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. As long as courts are open and functioning judicial review is not expendable.

All of the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought. These cases represent a small but significant reflection of that fact. The reversal of the judgments below is therefore in line with the highest traditions of the Court.

Mr. Justice RUTLEDGE, concurring.

I join in the result in each case and in the Court's opinion for the reasons it sets forth. A further reason would force me to this result. In my judgment a contrary construction would invalidate the statute. I have no doubt that Congress could make administrative or executive action final in such matters as these in the sense of excluding all judicial review, excepting only what may be required by the Constitution in the absence of suspension of the writ of habeas corpus.[1] Cf. *Ex parte McCardle*, 6 Wall. 318; *Lockerty* v. *Phillips*, 319 U. S. 182; *Ng Fung Ho* v. *White*, 259 U. S. 276.

But as I do not think Congress can make it a crime punishable by the federal judicial power to violate an administrative order without affording an adequate opportunity to show its constitutional invalidity, cf. *Yakus* v. *United States*, 321 U. S. 414, 460, dissenting opinion,[2] so even more do I not think Congress can make criminal the disobedience to such an order allowing no opportunity whatever for showing its unconstitutionality. It is one thing to deny jurisdiction of the courts altogether, save in so far as the Constitution of its own force may preserve the jurisdiction. It is altogether different to confer jurisdiction for enforcement purposes, but in doing so to cut off all right of defense on constitutional grounds.

To sustain such a view not only would have the courts marching up the hill in the criminal case and down again in habeas corpus,[3]

[1] Under the Selective Draft Act of 1917, the civil courts were not called upon to enforce induction orders by criminal proceedings; for the receipt of such an order automatically subjected a draftee to military law and for disobedience thereof he was triable by a court-martial for desertion. See United States v. McIntyre, 4 F. 2d 823; Billings v. Truesdell, 321 U. S. 542, 545-546; cf. The Selective Draft Law cases, 245 U. S. 366.

[2] And see the authorities cited in the Court's opinion, 321 U. S. at 433, 435. Apart from the question of the validity of splitting a criminal trial into civil and highly attenuated criminal parts, the issue in the *Yakus* case related to the adequacy of the opportunity allowed for challenging the order's validity in the Emergency Court of Appeals. The ruling did not comprehend a situation where no opportunity is afforded prior to or during the trial.

[3] It is not necessary in these cases to determine whether Congress could confine the scope of review in the 'criminal cause,' on constitutional grounds, to those which might be asserted in habeas corpus after conviction. The very fact that ordinarily the permissible scope of such objections in the latter type of proceeding is considerably more restricted than in the former is additional reason for not accepting the Government's view that Congress

It would make the judicial function a rubber stamp in criminal cases for administrative or executive action. And it would close the trap which in *Billings* v. *Truesdell*, 321 U. S. 542, 558, we said would be set if *Falbo* v. *United States*, 320 U. S. 549, were construed to permit what it is now sought to have done to the petitioners.

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intended to allow review by habeas corpus but not by defense in the criminal trial.

That view, of course, rejects the idea that "final" in the statute "means final," that is, beyond judicial reach in any manner, as it likewise implicitly but necessarily denies that "within the jurisdiction"—of the local boards—is wholly geographical.

Mr. Justice BURTON, with whom Mr. Chief Justice STONE concurs, dissenting.

The CHIEF JUSTICE and I think that the judgment of conviction in these cases should be affirmed, for reasons stated in Part I of Mr. Justice FRANKFURTER's opinion.

We think that under § 10(a)(2) of the Selective Service Act, rightly construed, the registrant is required, on pain of criminal penalties, to obey the Local Board's order to report for induction into the armed forces, even though the Board's order or the action of the Appeal Board on which it is based, is erroneous. "In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issues by habeas corpus." H. Rep. No. 36, 79th Cong., 1st Sess. (1945) 4. It follows that if the registrant is indicted for disobedience of the Board's order he cannot defend on the ground that the draft procedure has not been complied with or, if convicted, secure his release on that ground by resort to habeas corpus. The result is that such relief is open to him only if he obeys the order and submits to induction, when he is free to seek habeas corpus.

We do not find in the record of either case sufficient basis for reversal thereof on the grounds suggested in Part II of Mr. Justice FRANKFURTER's opinion.